IN THE

Supreme Court of the United States

October Term, 1976

No. 76-[illegible]

WILLIAM CHARLES JANSEN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

ARGUMENT 3

CONCLUSION 9

CERTIFICATE OF SERVICE 10

TABLE OF CITATIONS

Cases

Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967) 4

Harrington v. California, 395 U.S. 250, 23 L.Ed.2d 284, 89 S.Ct. 1726 (1969) 4

Reynolds v. State, 238 So.2d 557 (Ala. 1970) 8

Schneble v. Florida, 405 U.S. 427, 31 L.Ed.2d 340, 92 S.Ct. 1056 (1972) 5

United States v. Harris, 403 U.S. 573, 29 L.Ed.2d 723, 91 S.Ct. 2075 (1971) 9

United States v. Ventresca, 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965) 9

Other Authority

Webster's New World Dictionary, College Edition (1966) 8

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No. 75-794

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COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, the Commonwealth of Virginia, respectfully submits the following brief in opposition to the granting of a writ of certiorari in the above matter. The parties will be referred to herein by their respective positions in the state trial court, i.e. defendant and Commonwealth.

QUESTIONS PRESENTED

The Commonwealth would restate the question presented in the following terms:

Did the state trial court commit reversible error in overruling the defendant's motion to suppress certain evidence obtained pursuant to a search and seizure on the grounds

of insufficiency of the affidavit for a search warrant, where the exact same evidence was subsequently suppressed and excluded by the trial court at trial, on other grounds, and not allowed to go before the jury?

The Commonwealth further says the real issue involved in this case, as raised by the defendant in his petition for certiorari, is not even a question of search and seizure but is more appropriately stated as follows:

Did the state trial court commit reversible error in failing to grant the defendant a mistrial after certain evidence had been exhibited in the courtroom in front of the jury when that evidence was subsequently excluded and not allowed to be admitted into evidence?

STATEMENT OF THE CASE

Defendant's statement of the case is substantially correct insofar as it goes and to that extent it is hereby adopted. The Commonwealth would point out the following facts which were also a part of the evidence produced at defendant's state court trial which is the subject of this petition for certiorari.

Through the testimony of Detectives C. Brown, P. Cope, H. Allen, R. Brown, and Troopers J. Lokey, R. Jacobson, and L. Foster, it was established that a meeting took place on February 26, 1974, at a location in Fauquier County, Virginia, between the defendant, a co-defendant, Tom Walsh, and another co-defendant, Samuel Leo Truluck. (Tr. pp. 51-112). This meeting occurred subsequent to arrangements for said meeting having been made by telephone calls between Samuel Leo Truluck and Thomas Walsh, and between Thomas Walsh and an individual identified as Thomas Jenkins, the owner of a certain log cabin located in a remote area of Fauquier County, Virginia. These telephone conversations had been intercepted pursuant

to a legally authorized, court-ordered electronic surveillance conducted by the Virginia Department of State Police on February 25, and February 26, 1974.

Following the initial meeting between Jansen, Walsh, and Truluck, Jansen and Walsh proceeded to the log cabin where they met Jenkins.

Jenkins testified that he had a business arrangement between himself, the defendant Jansen, and Walsh whereby Jenkins was to store large quantities of marijuana for Walsh and Jansen at the cabin in Fauquier County for which Jenkins was to be paid $5.00 a pound. On the day in question, February 26, 1974, Jenkins testified that Jansen and Walsh came out to the cabin and got some of the marijuana out of the cabin and put it in the back of Walsh's vehicle. (Tr. pp. 182-196).

Walsh and Jansen then left the cabin and proceeded to a clearing in the woods at the end of a dirt road off of the main highway where they met with Samuel Leo Truluck driving another vehicle. Shortly after this meeting, Truluck was arrested at a location in Fauquier County and was found to be in possession of two large boxes of marijuana, approximately eighty pounds in all, containing the controlled drug tetrohydrocannabinols, or THC. These boxes containing the marijuana also had on the outside the fingerprints of the defendant, and were determined by the jury to be the same boxes that had previously been in the log cabin earlier in the day and that had been removed from the cabin by Walsh and Jansen and transferred to Truluck. (Tr. pp. 106-115).

ARGUMENT

The Commonwealth submits that the issue raised by the defendant in his petition for certiorari is a moot issue that does not need to be reached or decided by this Court at this

time. The marijuana which was the subject of the pretrial motion to suppress, on the grounds of insufficiency of the statement of time in the affidavit, was marijuana which was seized from the log cabin, referred to in the statement of the case above, pursuant to a search warrant of that cabin executed after the arrest of Truluck and the seizure of the marijuana from his car. Although the state trial court did not suppress the marijuana seized from the cabin, pursuant to the defendant's pretrial motion to suppress, the state trial court did exclude that evidence from consideration by the jury, at trial, on the grounds that the Commonwealth had not shown a sufficient connection between the defendant and the marijuana found at the cabin. Therefore, the evidence in question was excluded from the jury, which had the same effect as if it had been suppressed pursuant to the pretrial motion to suppress on the grounds of insufficiency of the affidavit.

The Commonwealth submits, therefore, that any error that may have been committed by the state trial court in not granting the pretrial motion to suppress ultimately became harmless error in that said evidence was not allowed to go to the jury and the jury was specifically prohibited from considering that evidence. *Chapman* v. *California,* 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967); *Harrington* v. *California,* 395 U.S. 250, 23 L.Ed.2d 284, 89 S.Ct. 1726 (1969).

The mere finding of error in the failure to set forth time in the affidavit, if that was in fact error, does not automatically require the reversal of the defendant's conviction. The properly admitted evidence of guilt, including the marijuana seized from Truluck's vehicle, which contained the defendant's fingerprints, is overwhelming of defendant's guilt of possession with intent to distribute that marijuana, and the prejudicial effect of allowing the subsequently excluded

evidence to remain in the courtroom for portions of the trial, in light of the state trial court's cautionary instructions, is so slight by comparison that it is clear beyond a reasonable doubt that the claimed-of error was harmless. *Schneble* v. *Florida*, 405 U.S. 427, 31 L.Ed.2d 340, 92 S.Ct. 1056 (1972).

Not only was the evidence seized from the cabin excluded by the trial court from consideration by the jury which in and of itself makes any denial of a pretrial motion to suppress harmless, the state trial court in addition took various precautions to make sure that the jury properly understood that such evidence was not to be considered. The defendant makes some issue of the fact that this evidence was allowed to be brought into the courtroom and certain testimony elicited about it, prior to its being excluded by the trial court. However, on two different occasions when evidence was brought in in this manner the Court cautioned the jury that the evidence was being presented only for purposes of identification and was not yet to be considered by the jury. On the first such occasion the trial court cautioned the jury that it will be the duty of the court to determine what evidence is admissible or not admissible and that the jury is not to consider evidence until it has been admitted by the trial court. (Tr. p. 71).

On a second occasion, during the course of the trial, when certain evidence was being brought into the courtroom, prior to its actually being admitted as evidence, the judge cautioned the jury as follows:

> "Members of the jury, before this is admissible, before you can consider it, it will have to be connected to the defendant. And of course, you will be instructed fully at a later time that the Court is admitting this as a circumstance that may possibly be considered. It would have to be connected with the defendant before you are entitled to consider in this case." (Tr. pp. 107, 108).

Finally, at the end of the trial, when the trial court determined that the evidence seized from the cabin was not to be admissible and not to be considered by the jury, the trial court took great care to properly instruct the jury on that point as follows:

> "Now, there has been an addition—there has been some evidence that the Commonwealth has attempted to introduce here. And the Court, I believe, indicated that it would rule on whether this was admissible. The Court has held that all of the boxes that were presented here, that were seized at the cabin of one Thomas Jenkins is not to be considered as such.
>
> "Now, I would direct you, members of the jury, not to consider that as evidence in the case. There were two boxes that were seized in the car according to the evidence that was taken from the car of one Samuel Leo Trulox, [sic] that evidence has been admitted into evidence. And those two boxes, along with the tape recording are admitted in evidence. I believe they are the only exhibits in evidence; isn't that correct? . . . All right. They are the only exhibits that you are to consider. Of course, you are to consider all of the testimony that you have heard from the witness stand that the Court has admitted.
>
> "You are not to be concerned with the rulings of the Court on the evidence. Insofar as counsel is concerned, you are not to hold the rulings of the Court against either counsel. It is of course the duty of the counsel to object to any evidence that it considers to be inadmissible, and the duty of the Court to determine what evidence should be considered. So I will instruct you to consider only the evidence that is before you, that the Court has admitted."

The Commonwealth therefore submits that not only was the evidence, which is the subject of the objection of the defendant herein, not admitted into evidence, for grounds

other than those raised in defendant's pretrial motion to suppress, but the jury was fully and properly instructed that it was not to consider the evidence seized from the cabin, and therefore there is no question whatsoever that any error that may have been committed in not granting the pretrial motion to suppress was in fact harmless error. The defendant was properly convicted of possession with intent to distribute tetrohydrocannabinols, an ingredient contained in marijuana, and in excess of eighty pounds of such marijuana was admitted into evidence, which marijuana was seized from the vehicle of Samuel Leo Truluck, containing the fingerprints of the defendant, after having previously been in the cabin where it was being stored by Jenkins on behalf of the defendant. None of this finding of guilt by the jury required the introduction into evidence of the marijuana which was seized from the cabin and which was eventually excluded from evidence.

The Commonwealth submits in fact that the only issue really before this Court, as a result of the defendant's petition for a writ of certiorari, is in fact an objection on the part of the petitioner to the fact that the trial court did not grant him a mistrial, after having allowed the evidence seized from the log cabin to be brought into the courtroom on occasion and exhibited to the jury as being the subject of the testimony of some of the police officers involved, prior to its being excluded from evidence. Respondent submits that the granting of a mistrial under such circumstances is in fact a matter within the sound discretion of the trial court and is not a matter raising an issue of federal constitutional magnitude, and therefore is not the proper subject of a petition for a writ of certiorari.

Although the Commonwealth does not believe that the Court herein should or can reach the merits of the question concerning the sufficiency of the affidavit for the search

warrant, for the reasons set forth above, the Commonwealth is not in any way admitting that the affidavit for the search warrant was in fact invalid for failure to set forth specifically the time when the various instances set forth therein occurred. As a general rule, the cases appear to be unanimous that an affidavit must contain a statement as to the time when the facts relied upon occurred. 100 A.L.R.2d 525. The purpose of this statement of time is to establish a reasonable belief that the same conditions described in the affidavit still prevail at the time of the issuance of the search warrant. Since an affidavit must contain a statement of time, the real question is what is considered a sufficient statement of time.

A simple reading of the affidavit in the instant case clearly reveals that no specific date is set forth therein. The mere lack of a specific date, however, is not fatal, when the time reference of the facts constituting probable cause is sufficiently established in some other fashion in the affidavit. In the affidavit in the instant case, the only word used to suggest a time frame is the word "currently." The issue, then, is whether an affidavit couched in the language of *currently* is a sufficient statement of time for the purpose of an affidavit.

In *Reynolds* v. *State,* 238 So.2d 557 (Ala. 1970), it was held that an affidavit can be said to establish the necessary time element when the word "recently," when connected with the other language in the affidavit, establishes probable cause. Such a rule as established in *Reynolds,* that "recently," coupled with other language of the affidavit, can be a sufficient statement of time on which probable cause can be found would appear to be valid reasoning in the instant case. The word *currently* is sufficiently similar to the word *recently.* The word *currently* seems to connote a more recent point in time than the word *recently. Currently* has been defined to mean "now." *Webster's New World Dictionary,*

College Edition (1966). In the instant case the word *currently* coupled with the other language in the affidavit shows that the circumstances referred to in the affidavit have gone on and were going on at the time in which the affidavit was being sworn to.

Furthermore, in reading affidavits for search warrants, this Court has stated that they may be interpreted and read in a common sense fashion, rather than in technical terms. *United States* v. *Ventresca,* 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965). Furthermore, the magistrate can rely on a law enforcement officer's knowledge of the person against whom the search warrant is directed. *United States* v. *Harris,* 403 U.S. 573, 29 L.Ed.2d 723, 91 S.Ct. 2075 (1971) (plurality opinion). Under these guidelines, the affidavit in the instant case, which concededly does not go into any detail as to the current time situation, can be read in this fashion: that the events recited in the affidavit, of which the affiant-officer had personal knowledge, happened in the most recent period of time, and that the affiant-officer's conclusionary remark as to his belief that the marijuana is currently present is based on his experience as a law enforcement officer and his knowledge of the nature of the distribution of marijuana.

The Commonwealth submits therefore that the affidavit for the search warrant in the instant case was valid and did sufficiently apprise the magistrate that the facts recited therein were current and led up to a current and existing situation, and therefore the defendant's motion to suppress the evidence seized at the cabin was not well-taken.

CONCLUSION

For the reasons set out herein, it is submitted that no error was committed by the state trial court in refusing to suppress the evidence seized at the cabin, prior to the trial, since

such evidence was subsequently excluded from consideration by the jury and therefore no error was committed in not previously suppressing that evidence. It is further submitted that the affidavit in question was not insufficient for failure to set forth necessary time requirements. And it is further submitted that the issues raised by the petitioner herein are not only moot but do not raise an issue of constitutional magnitude. For these reasons the Commonwealth submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on or before the 20th day of February, 1976, I mailed three copies of the foregoing brief to Lowry J. Miller, Esq., counsel for the petitioner, Miller, Miller, Patterson & Reese, 2701 North Pershing Drive, Arlington, Virginia 22201.

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